SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967.

No. 455.

CLAYTON H. STIEF,

Petitioner,

v.

J. A. SEXAUER MANUFACTURING CO., INC.
and
DIAMOND ALKALI COMPANY,

Respondents.

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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FOREWORD.

Petitioner here filed his original Petition for Certiorari to the United States Court of Appeals for the Second Circuit because the Second Circuit affirmed a directed verdict denying the petitioner the right to a jury trial on a record which he respectfully submits unquestionably supports a submissible issue of fact as to negligence and causation which totally and permanently blinded him. He was using a drain pipe cleaning chemical which formed hydrogen when it contacted the inner galvanized coating of the pipes into which he had placed the chemical powder. It ex-

panded and exploded, blasting out a loosely tightened nut in the pipe and splattered completely across the room to smother his face in this lethal liquid substance.

Judge Friendly in a markedly angry dissent noted that your petitioner was deprived of his right to trial by jury under the 7th Amendment of the Federal Constitution by the actions of the trial judge and the majority below. This untoward result was caused solely because the wrong legal test as to the sufficiency of the evidence to be followed in federal courts was used. And this confusion resulted from the failure of this court to decide this question which it itself in *Dick v. New York Life Insurance Co.*, 359 U. S. 437, 444-445 conceded in 1959 remains to this day "an unsettled question". That question needs to be decided now. By the refusal of certiorari this court has again delayed doing so.

We at the Bar have repeatedly been taught and we as counsel in this case have told the petitioner that the denial by this court of a petition for certiorari does not mean that the petitioner's contentions are wrong, or that the decision below is right. It may merely mean that the question is either not of sufficient national importance to warrant consumption of this court's time, or that it is not now timely to meet this issue. Counsel have explained to the petitioner that the Court today is deeply concerned and engaged in reviewing and considering the petitions of men who are in prison who claim that they have been convicted at their trials by violations of their constitutional rights under the various sections of the Federal Constitution of the United States, albeit the evidence of their guilt is almost insurmountable. Petitioner respects the high moral motivation in this. But petitioner says that he too is in a prison. He says he is in an economic prison from which he finds it impossible to gain his freedom which he needs so desperately as he is a very young man, married and the father of three small children who look to him for support. He points out that he has not been

guilty of any misconduct or of any act which produced this untoward event and that he is the completely innocent victim of this tragic occurrence. He points out that no one has said that he was guilty of contributory negligence, and that in no opinion is there any such assertion. He wonders then whether his tragic stance in life today is to be considered merely "an act of God" and that he must consider the refusal of this Court to review his case, as "part of his lot in life". How does counsel reply to the searching inquiries by this humble, simple citizen who has been put into this tragic position and asks only that he be given his day in court? Where the decision rests so firmly upon a proposition of law which only this court "can set-[illegible] does counsel explain to this lonely petitioner that he may be right, that the law may really be in support of him, but that the law has neither the time nor the willingness to reach him now? How does counsel explain to this petitioner that while *every* person charged with crime will be given a hearing in this court if there is any evidence of a violation of any constitutional protection given him by law, that he, the petitioner here, will not be considered as an idividual and how the law affects him—that the court will only consider questions of law as such without regard to its effect on the individual involved—that the court concerns itself only with the general determination of the body of law itself? We respectfully submit as counsel that there is a grave constitutional question in this case. That the law does support the petitioner. That the record does under the law entitle him to the submission of his case to the jury. That this issue of law is one which must repeat itself invariably and constantly in every district court in the United States where federal diversity jurisdiction matters are being presented daily and that there is a dire need for the decision of this point here and now. We proceed to the presentation of the legal question involved:

ARGUMENT.

1. In this case after a hung jury the learned Trial Judge in the Southern District of New York granted respondent-defendant's motion for judgment on the whole record on the ground that the petitioner had failed to establish that the defendant Sexauer Manufacturing Co. was negligent in the labelling of its chemical product used as a drain cleaner and/or that such negligence was the proximate cause of the accident. This action of the Trial Judge was affirmed in a two-to-one opinion by Judge Moore-Chief Judge Lombard concurring, with a strong dissent by Judge Friendly who held that both negligence and proximate cause were adequately established.

2. This accident having occurred in Pennsylvania and all of the contacts with the accident having taken place in Pennsylvania, under all rules of Conflicts of Law, Pennsylvania law was controlling. As such, the cases of *Maize v. Atlantic Refining Co.*, 352 Pa. 51, 41 A. 2, 850 (1945) and *Pope v. Reading*, 304 Pa. 326, 156 A. 106 (1931) were the key citations. Under *Maize, supra,* the manufacturer and/or distributor is required to warn of every risk which he knows or ought to know might prove to be a source of danger to prospective users or those in the ambit of its use. No warning was given on this label that the contents of a can of Mule Kick used as instructed by dissolving it in hot water, would if it came in contact with the inner zinc coating of galvanized pipe or zinc particles normally found in debris that clogs drain pipes, would create hydrogen. Nor was any warning given that hydrogen expands when the pipes are thawed by the application of a Prestolite torch as recommended on the label and would explode and splatter out of the nearest possible opening. Under *Pope v. Reading, supra,* the owner or manufacturer or distributor of a product, building, chattel or goods is required to know exactly and warn about the hazards that exist or arise in the normal use of such products. No such warning indicating that this

chemical mixed in hot water would expand when it came in contact with zinc in any form in galvanized pipe and would create hydrogen which would explode and splatter through any opening it might find within the contained area to splash outwardly a great distance in its attempt to escape from confinement. Precisely that happened in this case and it totally and permanently blinded this married man, the father of three small children. Negligence may be omission as well as commission. The failure to warn of a particular hazard at all is as much negligence as is a false representation of safety.

3. The law in the federal courts has generally been held to be that if there is *any* evidence which sustains the contention of the plaintiff (petitioner here), the case must be submitted to the jury even in the presence of evidence to the contrary. *Mull v. Ford Motor Co.*, 368 F. 2d 713, 716, n. 4 (C. A. 2, 1966).

4. Under Pennsylvania law the rule is identical. In *Smith v. Bell Telephone Co. of Pa.*, 397 Pa. 134, 153 A. 2d 477 (1959) the Pennsylvania Supreme Court said at page 137:

> "The formula that 'the circumstances must be so strong as to preclude the possibility of injury in any other way and provide as the only reasonable inference the conclusion plaintiff advances' is not a correct statement of the rule to be applied by the judge on deciding a motion for either a non-suit or binding instructions. If that were the rule what would be the province of the jury? In no case where there was more than one reasonable inference would the jury be permitted to decide. *Insofar as this rule is stated in our cases it is disapproved.*" (Italics supplied.)

and at page 138 the Court said:

> ". . . Clearly this does not mean that the jury may not draw inferences based upon all the evidence and

the jurors' own knowledge and experiences, [in essence 'common sense'] for that is, of course, the very heart of the jury's function. It means only that the evidence presented must be such that by reasoning from it, without resort to prejudice or guess, a jury can reach the conclusion sought by plaintiff, and not that that conclusion must be the *only* one which logically can be reached." (Emphasis supplied.)

5. According to respondent's own brief the rule that prevails in the United States Courts is not the rule of New York State Courts or the Supreme Court of Pennsylvania. It relies upon the old Pennsylvania case of *Hopkins v. E. I. Dupont de Nemours & Co.*, 212 F. 2d 623, 625 (C. A. 3, 1954) where the Pennsylvania rule was said to be at page 625:

> ". . . where plaintiff's evidence supports an inference that excludes the liability of the defendant just as strongly as an inference that comprehends liability, a jury would have to engage in speculation and conjecture in order to attribute the accident to one rather than the other."

That case and its holding have specifically been rejected by the new Pennsylvania cases of *Smith v. Bell Telephone Co., supra,* and *Antonelli v. Tumolo,* 390 Pa. 68, 132 A. 2d 285 (1957) which specifically adopts the federal test adopted in *Lavender v. Kurn,* 327 U. S. 645 (1946). Respondent then cites and relies as it must upon New York cases which hold that the plaintiff has not presented a submissible case requiring jury determination *unless the plaintiff has eliminated every other possible cause of the accident,* even though there be other evidence from which the jury could find the cause of the accident to be the negligence of the defendant. The leading New York case is *Ruppert et al. v. Brooklyn Heights R. R. Co.,* 154 N. Y. 90 where the Court at p. 93 said:

"It is entirely true that a material fact in a civil or criminal action may be established by circumstantial evidence, but the circumstances must be such as to lead fairly and reasonably to the conclusion sought to be established *and to exclude any other hypothesis fairly and reasonably.*" (Emphasis supplied.)

What test (to determine the sufficiency of the evidence) is to be applied is directly involved in this case. Is the law of New York to be applied? Is the law of the Federal Courts to be applied? Is the law of Pennsylvania to be applied? Does the Erie doctrine require the Pennsylvania rule to be applied? Or as Judge Lumbard suggested in *Mull v. Ford Motor Co., supra,* is the Erie doctrine "subservient to the kind of jury trial in federal courts that is preserved by the Seventh Amendment . . . and that the federal standard should be applied where the issue is the sufficiency of the evidence required to take the case from the jury"?

If Judge Lumbard's quote in *Mull, supra* is correct as to the proper test, then an explanation must be made as to his departure from that rule in this case when he joined with Judge Moore in forming a majority which resulted in action directly contrary to his own enunciation of the proper rule. The decision in the Second Circuit in the instant case is in direct conflict with *Mull, supra.* The only explanation we can give is that Judge Moore paid lip service in his opinion to that rule when he stated the ground rules for his decision and said:

"First, the question for the trial court was: were there any facts, or facts from which inferences might be drawn, which should have been sent to the jury for its determination as to whether Sexauer had breached a duty to plaintiff. It was not for the trial court so to decide unless there was a failure by plaintiff to present any facts which met legal standards.",

and then ignored it completely in the substance of his opinion. Apparently Judge Lumbard relied on this general assurance without a recognition of the fact that the stated test was in fact abandoned and indeed rejected. No better exposition of this can be found than the sharp critical analysis of it by Judge Friendly in his dissenting opinion and our own comments thereon in our prior briefs filed in this Court. No clearer confession of this can be made than the fact that Sexauer's brief in this court does not even try to support the majority holding as being in accord with *Mull, Lavender v. Kurn, Smith v. Bell Telephone Co.*, or *Antonelli v. Tumolo*, all *supra*. Instead it cites *Hopkins v. Dupont, supra*, and *Ruppert v. Brooklyn Heights R. R., supra*, to establish that petitioner's burden to make out a submissible case requires exclusion of every other hypothesis.

6. This court has in *Dick v. New York Life Insurance Co.*, 359 U. S. 437, 444-445 noted that it was holding in abeyance and that there would remain unsettled the question of whether it is proper to apply a state or federal test of the sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship. The very recent decision in the 8th Circuit in *O'Hare v. Merck & Co.*, 381 F. 286, 288 (C. A. 8, 1967) reveals the great importance of the issue presented by this case. There that court only a few days ago took occasion to note that this court had not yet settled this proposition of law which is so deeply bound up in any attempt to reach a decision in the instant case. That court said at 288:

> "We again take note of the Supreme Court's observation in Dick v. New York Life Insurance Co., 359 U. S. 437, 444-445, 79 S. Ct. 921, 3 L. Ed. 2d 935 (1959) *that the question whether it is proper to apply a state or federal test of the sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship remains unsettled.* See also

Mercer v. Theriot, 377 U. S. 152, 156, 84 S. Ct. 1157, 12 L. Ed. 2d 206 (1964). We have similarly left the question open. See Jiffy Markets, Inc. v. Vogel, 340 F. 2d 495, 498 (8th Cir. 1965); Hanson v. Ford Motor Company, 278 F. 2d 586, 589 (8th Cir. 1960)." (Emphasis supplied.)

We submit that this case is controlled by the federal test as to the sufficiency of the evidence. We contend that if any state rule is to have any influence here, it would be that of Pennsylvania and not that of New York. We emphasize that the federal rule and the Pennsylvania rule are identical but different from the New York state rule which in substance the majority below followed and that this open question must now here be decided.

WHEREFORE it is respectfully submitted that we now raise an issue of grave importance with new authorities and a new clear recognition of this very urgent problem and the need for its resolution at this time. And there is a broad human issue involved in this particular case that calls for a relaxing of any conceptualism in deciding whether certiorari should be granted on this issue *now*.

Respectfully submitted,

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